



**34/50 = 68%**

**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3A**

**RESIT ASSESSMENT: SEPTEMBER 2023**

**THE INSOLVENCY SYSTEM OF THE UNITED STATES**

***This is the summative (formal) assessment for Module 3A of this course.***

***The mark awarded for this assessment will determine your final mark for Module 3A. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

## INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment3A]. An example would be something along the following lines: 202223-336.assessment3A. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "student number" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. The final submission date for this assessment is 21 September 2023. Please provide the completed assessment back to Sanrie Lawrenson via email at [Sanrie.Lawrenson@insol.org](mailto:Sanrie.Lawrenson@insol.org) by no later than 23:00 (11 pm) GMT on 21 September 2023. No submissions can be made after this time, no matter the circumstances.**
- 6. When submitting your assessment you will be required to confirm / certify via email that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**

**ANSWER ALL THE QUESTIONS**

QUESTION 1 (multiple-choice questions) [10 marks in total] **7 marks**

**Questions 1.1. - 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph in yellow. Select only ONE answer. Candidates who select more than one answer will receive no mark for that specific question.**

Question 1.1

**Car Corp, incorporated and headquartered in Michigan, owes Parts Inc, incorporated and headquartered in Mexico, USD 10,000 on a past-due invoice for components used to build Car Corp vehicles. May Parts Inc file an involuntary petition to place Car Corp into chapter 11 bankruptcy proceedings?**

**(a) Yes, regardless of the circumstances.**

**(b) Yes, if Car Corp has fewer than 12 non-contingent, non-insider creditors.**

**(c) Yes, if other creditors owed at least USD 5,775 join in the petition.**

**(d) No, because Parts Inc does not know whether Car Corp is insolvent.**

**(e) No, because Parts Inc is not a US company.**

Question 1.2

**Answer this question with reference to the set of facts set out in question 1.1 above: Which of the following is likely to be a party in interest in the bankruptcy of Car Corp?**

**(a) A shareholder in Parts Inc, to which Car Corp is indebted.**

**(b) A journalist writing about Car Corp's bankruptcy.**

**(c) A shareholder in Investment Corp, Car Corp's parent company.**

**(d) A retired employee of Car Corp who receives payments from the company's pension plan.**

**(e) A non-profit organization that advocates for companies like Car Corp to be held responsible for climate change**

Question 1.3

**Which of the following entities does not satisfy the minimum presence requirement to be a debtor under any chapter of the Bankruptcy Code?**

**(a) A foreign domiciled company that pays a US attorney a retainer.**

**(b) A company with several US bank accounts, but no physical presence in the United States.**

**(c) A company with US patents, but no physical presence in the United States.**

**(d) Options (a) to (c) above satisfy the minimum requirement for presence in the United States.**

**(e) None of the above (options (a) to (d)) satisfy the minimum requirement for presence in the United States.**

Question 1.4

**Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?**

**(a) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.**

**(b) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.**

**(c) An insolvency professional appointed by the court overseeing the foreign proceeding.**

**(d) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.**

**(e) All of the above.**

Question 1.5

**Which of the following regarding executory contracts is false?**

**(a) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.**

**(b) Executory contracts are clearly defined by the Bankruptcy Code.**

- (c) In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.**
- (d) Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.**
- (e) Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.**

Question 1.6

**Which of the following is not a requirement to confirm a “cramdown” plan?**

- (a) That the plan is fair and equitable to dissenting classes of creditors.**
- (b) Acceptance of the plan by at least one class of impaired, non-insider creditors.**
- (c) Acceptance of the plan by all classes of secured creditors.**
- (d) That the plan does not discriminate unfairly against dissenting classes of creditors.**
- (e) That the dissenting creditors receive no less than they would under a liquidation scenario.**

Question 1.7

**Which of the following statements about “pre-packs” is false?**

- (a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.**
- (b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.**
- (c) A pre-pack debtor may spend as little as a single day in bankruptcy.**
- (d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.**
- (e) Creditors’ commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.**

Question 1.8

***If a debtor rejects an executory trademark license agreement under which the debtor licenses its trademark to a manufacturer, which of the following is true:***

- (a) The manufacturer has a claim for damages for breach of contract.***
- (b) The manufacturer must immediately stop using the trademark.***
- (c) The manufacturer can continue using the trademark for the remaining period of the license.***
- (d) Both options (a) and (b).***
- (e) Both options (a) and (c).***

Question 1.9

***Which of the following about 363 sales is false?***

- (a) A good faith purchaser at a 363 sale may retain the property notwithstanding a subsequent reversal of court approval for the sale on appeal.***
- (b) The debtor-in-possession must establish that the transaction is in the best interests of the estate as a whole.***
- (c) In chapter 15 proceedings, a foreign court's approval alone suffices for a 363 sale.***
- (d) Debtors must carry out a robust marketing process for the sale.***
- (e) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.***

Question 1.10

**Which of the following regarding substantive consolidation is true?**

- (a) **It respects the boundaries of corporate separateness.**
- (b) If a creditor can show it extended credit on the basis of corporate separateness, it has a valid objection to substantive consolidation.**
- (c) **It is the treatment of two or more creditors as a single creditor to simplify the claims process.**
- (d) **Substantive consolidation is commonly used to resolve bankruptcies of corporate groups.**
- (e) **Authority for substantive consolidation comes from the Bankruptcy Code.**

QUESTION 2 (direct questions) [10 marks]

Question 2.1 (1 mark) **1 mark**

**What is setoff and why is it not permitted in many circumstances?**

*[Setoff is netting the creditor's claim to the debtor against the creditor's monetary obligation to the debtor. Setoff is not permitted in many circumstances, because it can unfairly improve position of one creditor as compared to the other creditors.<sup>1</sup>]*

Question 2.2 [2 marks] **2 marks**

**What is a "priming lien" and what requirements must be met for such a lien to be granted to secure DIP financing?**

*[Priming lien is a lien securing a postpetition loan which is senior or equal to a lien that was already attached the debtor's assets. In order for the court to grant the priming lien the debtor shall demonstrate that (i) it is unable to obtain finance through any other options and (ii) the interest of the creditor whose security interest is primed by the lien is adequately protected.<sup>2</sup>]*

Question 2.3 [2 marks] **2 marks**

**What are two potential consequences of a violation of the automatic stay?**

*[An act in violation of the automatic stay:*

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<sup>1</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.7.4, page 59.

<sup>2</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.4.4, pages 29-30.

- 1. will be held as made in contempt of court and will be void and voidable following imposition of contempt sanctions against the stay violator.*
- 2. will be regarded lawful if a party in interest has successfully applied for a lift of the stay retrospectively to validate the act.<sup>3]</sup>*

Question 2.4 [2 marks] **2 marks**

***In voting on a plan of reorganization, which class(es) of creditors are (i) deemed to accept the plan, (ii) deemed to reject the plan and (iii) permitted to vote on the plan? What vote is necessary for a class of creditors to accept a plan?***

*[Unimpaired class of creditors is deemed to accept the plan  
Class that will receive nothing is deemed to reject the plan  
Impaired creditors are allowed to vote on the plan.  
Vote of two-thirds is necessary for the plan to be accepted.]*

Question 2.5 [3 marks] **2 marks**

***Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:***

- (a) ***Which cause of action applies only to transfers made on account of antecedent debt?***
- (b) ***Which cause of action requires that the debtor be presumed or proven to have been insolvent at the time of the transfer?***
- (c) ***Which cause of action requires that the debtor be proven to have intended to frustrate creditors' recoveries?***

*[a - preference avoidance<sup>4</sup>*

*b - constructive fraudulent conveyance **preference***

*c - actual fraudulent conveyance<sup>5]</sup>*

QUESTION 3 (essay-type questions) [15 marks in total]

Question 3.1 [3 marks] **3 marks**

***Describe the circumstances in which a bankruptcy court may enter a final order consistent with the US Constitution, who reviews appeals from bankruptcy court orders and how orders that are not constitutionally final are reviewed.***

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<sup>3</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.4.2.2, pages 22-23.

<sup>4</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.7.2.1, pages 51-53.

<sup>5</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.7.3, pages 57-58.



*[Final orders dispose of all issues without anything to be decided in a bankruptcy case or in a discrete dispute.<sup>6</sup> Appeals are reviewed by the district court for the district in which the bankruptcy court which issued the order sits or in some circuits by the Bankruptcy Appellate Panels consisting of judges of a bankruptcy court.<sup>7</sup> In case of not constitutionally final orders the competent court reviews *de novo* only those findings of fact and conclusions of law to which the party objects.<sup>8</sup>]*

Question 3.2 [3 marks] **2 marks**

**What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?**

*[Foreign representative does not have avoidance powers provided by the Bankruptcy Code. Foreign representative may obtain equivalent relief through seeking avoidance powers in a plenary proceeding which the foreign representative is entitled to initiate after recognition of the foreign proceedings under Chapter 15 or seek to recognize an equivalent relief under applicable law.<sup>9</sup>]* **Can commence a plenary proceeding under chapter 7 or 11**

Question 3.3 [4 marks] **3 marks**

**What rules should one review when preparing a filing for a bankruptcy court?**

*[US Bankruptcy Code, Federal Rules of Bankruptcy Procedure, Federal Rules of Civil Procedure (by incorporation into Federal Rules of Bankruptcy Procedure), local rules of procedure issued by each bankruptcy court<sup>10</sup>]* **Judge's personal practices**

Question 3.4 [5 marks] **5 marks**

**What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?**

*[Fiduciary duties:*

- 1. Duty of loyalty to the corporation's best interest and*
- 2. Duty of care in educated decision-making (except for the cases protected by the business judgement rule).*

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<sup>6</sup> Bullard v Blue Hills bank, 135 S Ct 1686 (2015); Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.3.5.2, pages 19-20.

<sup>7</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.3.5.3, page 20.

<sup>8</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.3.5.4, pages 20-21.

<sup>9</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.3.5.4, pages 20-21.

<sup>10</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 4, pages 3-5.

*Both in the ordinary course of business and in case of potential and actual insolvency duties are owed to the corporation and its shareholders.<sup>11]</sup>*

QUESTION 4 (fact-based application-type question) [15 marks in total]

Question 4.1 [5 marks] **2 marks**

***iWork Ltd leases office space from office building owners and sublets the space to small businesses. Due to the increases in the numbers of businesses operating remotely, iWork Ltd has suffered a decline in revenues. As a result, it has failed to pay rent on some of its office space leases. What protections does the Bankruptcy Code provide to lessors of office space to iWork Ltd?***

*[In case iWork Ltd initiates reorganization under Chapter 7, lessors of the iWork will have an unsecured claims priority.*

*Under Chapter 11, a trustee shall make a decision on assumption and assignment or rejection of the lease contract within 120 days of the order for relief. This period can be extended to 90 days but any further extension can be made with approval of lessors of the office space as commercial premises.<sup>12]</sup>*

*Upon request of the lessor, the automatic stay may be lifted by court on the ground of lack of adequate protection of an interest in property of the estate.<sup>13]</sup>*

*Since iWork is not yet in bankruptcy and its debt will be considered as pre-petition, the lessor will be entitled to file a claim in iWork bankruptcy.<sup>14]</sup>*

***iWork must pay rent as an administrative expense for the period prior to rejection of a lease. [but note Covid exception to this has developed in practice]***

***Administrative priority treatment for 2 years of rental payments for leases that are assumed and subsequently rejected.***

***Lessors have a claim in the bankruptcy for unpaid pre-petition rent.***

Question 4.2 [5 marks] **0 marks**

***Skin Luxe is incorporated and has a principal place of business in France where it develops and manufactures high end skincare products. Skin Luxe sells its skin care***

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<sup>11</sup> *North Am Catholic Educational Programming Foundation, Inc v Gheewalla*, 930 A.2d 92, 103 (Del 2007); Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.7.5, page 60.

<sup>12</sup> 11 USC, § 365(d)(4); Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.4.5, page 31.

<sup>13</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 5.4.2, page 24.

<sup>14</sup> Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 6.2.4, page 66.

**products through its own boutiques in many international cities, including Paris, Las Vegas, London and Hong Kong. Skin Luxe's English law-governed bonds are due to mature in one year, but it is unable to repay or refinance them. Skin Luxe is considering using an English scheme of arrangement to restructure the bonds.**

**Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding.**

*[First, the English scheme of arrangement could be granted recognition under US chapter 15. According to § 101(23) of the Bankruptcy Code, the term "foreign proceedings" includes administrative proceedings in a foreign country under a law relating to insolvency or adjustment of debt in which proceedings the assets and affairs of the debtor are subject to control or supervision by a foreign court.<sup>15</sup> Accordingly, English scheme of arrangement can be granted recognition under the Bankruptcy Code.*

*Second, while the issue is subject to consideration of the competent US court, the English-law governed scheme of arrangement will likely be recognized as foreign main proceedings. Qualification of the English-law governed scheme of arrangement depends on whether it can be characterized as commenced in the Skin Luxe's COMI. Although COMI is presumed to be the place of incorporation, such presumption is rebuttable<sup>16</sup> and other factors can be assessed by the court. One of such factors include jurisdiction whose law will apply to most disputes.<sup>17</sup> Skin Luxe's scheme of arrangement is governed by the English law and is related to its bonds issued under the English law. Accordingly, England can be recognized as Skin Luxe's COMI for the purpose of recognition of the scheme of arrangement.*

*In case the court decides that the English-law governed scheme of arrangement cannot be recognized as foreign main proceedings, it will not likely be recognized as foreign non-main proceedings since Skin Luxe's does not have an establishment in England.<sup>18]</sup>*

***Skin Luxe's COMI is France because it is incorporated and has a principal place of business there. Connections with other jurisdictions are not sufficient here to overcome the presumption in favor of the place of incorporation. Because the English scheme is not in the country of Skin Luxe's COMI, recognition as a foreign main proceeding is not possible. Skin Luxe operates a boutique in London so it has an establishment in the jurisdiction of the scheme proceeding. Therefore recognition as foreign non-main is appropriate.***

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<sup>15</sup> 11 USC, § 101(23); Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 6.2.2, page 62.

<sup>16</sup> 11 USC, § 1516(c).

<sup>17</sup> In re SPhinX, Ltd, 351 BR 103, 117 (Bankr SDNY 2006); Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 6.2.2, page 63.

<sup>18</sup> 11 USC, § 1502(2); Foundation Certificate in International Insolvency Law, Module 3A Guidance Text, Section 6.2.2, page 63.

Question 4.3 [5 marks] **3 marks**

***Speculation Inc is engaged in day-trading stocks from leased office space with two employees. It funds its trading through a margin loan from its broker, where the shares it purchases are held as collateral. For a while, Speculation Inc was very successful in trading, and the US Department of Justice (DOJ) has announced an investigation into whether its success was due to illegally trading on insider information. More recently, Speculation Inc has had serious trading losses, causing its broker to declare a default on the margin loan. It also has fallen behind on its rent, and has been sued in civil suit by a former employee alleging she was fired due to due to gender bias.***

***What would be the effect of a chapter 11 petition being filed by Speculation Inc on each of (i) the DOJ investigation, (ii) margin loan default; (iii) the delinquent lease and (iv) the employment discrimination lawsuit?***

***[Chapter 11 petition will invoke automatic stay (1) in respect of all the Speculation Inc liabilities except for the DOJ Investigation, because it is a regulatory investigation, (1) and the employment discrimination lawsuit, because automatic stay can be attached to the property only.<sup>19</sup>] (1)***

***Foreclosure on the collateral securing the margin loan would not be stayed because a margin loan is a securities contract exempt from the automatic stay.***

***Any action by the landlord to recover unpaid rent or evict Speculation Inc. would be subject to the automatic stay because the lease had not expired at the end of the term, but rather were simply in payment default.***

\* End of Assessment \*

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<sup>19</sup> 11 USC, § 362(a)